IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 13TH SEPTEMBER 2007 / 22ND BHADRA 1929

WP(C).No. 13836 of 2006(V)

AGAINST THE ORDER IN OS 1079/2004. IN
IA.845/2005 of MUNSIFF COURT, KODUNGALLUR

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PETITIONERS:

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1. RAMANADHAN, S/O. PATHAZHAKATTIL
   GANGADHARAN, POOVATHUMKADAVU DESOM,
   PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK.

2. MURALEEDHARAN,
   S/O. VELLOOPARAMBIL SUBRAMANIAN,
   POOVATHUMKADAVU DESOM, PAPPINIVATTOM VILLAGE,
   KODUNGALLUR TALUK.

BY ADV. SRI.T.M.CHANDRAN

RESPONDENTS:

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1. BHARGAVI, W/O. AZHIPARAMBIL MADAVAN,
   POOVATHUMKADAVU DESOM, PAPPINIVATTOM VILLAGE,
   KODUNGALLUR TALUK.

2. AJITHAN, S/O. AZHIPARAMBIL MADAVAN,
   POOVATHUMKADAVU DESOM, PAPPINIVATTOM VILLAGE,
   KODUNGALLUR TALUK.

BY ADV. SRI.M.SHAJU PURUSHOTHAMAN
SRI.K.S.RAJESH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 13/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

WP(C) NO.13836/2006

APPENDIX

PETITIONER'S EXHIBITS:

EXT. P1: COPY OF THE REPORT AND PLAN DT. 04.01.05 SUBMITTED BY THE ADVOCATE COMMISSIONER.

EXT. P2: COPY OF THE PETITION I.A. 144/05 FILED BY THE RESPONDENTS BEFORE THE MUNSIFF COURT, KODUNGALLUR.

EXT. P3: COPY OF THE ORDER IN I.A. 144/05 ON THE FILE OF .DO.

EXT. P4: COPY OF THE NOTICE DT. 21.02.05 ISSUED BY THE ADVOCATE COMMISSIONER.

EXT. P5: COPY OF THE REPORT AND PLAN DT. 07.03.05 SUBMITTED BY THE ADVOCATE COMMISSIONER.

EXT. P6: COPY OF THE PETITION I.A. 845/05 FILED BY THE PETITIONERS BEFORE THE MUNSIFF COURT, KODUNGALLUR.

EXT. P7: COPY OF THE ORDER DT. 18.02.06 PASSED BY THE MUNSIFF COURT, KODUNGALLUR.

/TRUE COPY/

P.A. TO JUDGE

JP

M.N.KRISHNAN, J

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W.P.(C) No.13836 OF 2006

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Dated this the 13th day of September 2007

JUDGMENT

This writ petition is filed to set aside Ext.P7 order passed by the Munsiff's Court, Kodungallur in I.A.No.845 of 2005 in O.S.No.1079 of 2004. Petitioners herein moved Ext.P6 application for setting aside the Commissioner's report. Petitioners filed an affidavit contending that the Commissioner had not inspected the property on the date mentioned by her. Though notice was given to visit the property on 23.2.2005, she did not come on that day at all and no further notice is given to the plaintiffs regarding the date of inspection. Petitioners have also averred that many of the factors reported in the 2nd report are against truth and the learned counsel would submit that even the plaintiffs apprehend the impartiality of the Commissioner and it is so stated in the petition. Plaintiffs moved an application for issuance of a Commission and the very same Commissioner inspected the property reported the matter and also stated about the presence or non-presence of the parties in that report. In the said report the Commissioner in the penultimate paragraph of the report submits that the way pointed out by her is the way as shown by the plaintiffs and she had

reported that she was not in a position to see any other way. At the instance of the defendants, the plan and report of the Commissioner were remitted. In that report, there is a mention regarding another way. It appears that there is a typographical error and really the Commissioner had inspected the property on 26.2.2005 and not on 26.5.2005. The notice of inspection was given on 23.2.2005. Whatever it may be, the Commissioner has reported that the plaintiffs were available in the spot at the time of inspection though it is refuted by them in the affidavit. It is very easy to attribute motives and allegation against a Commissioner. When an application for setting aside the Commissioner's report with personal allegation against the Commissioner, it is mandatory that there is evidence in support of such contentions. Imputing allegations and withholding from the box cannot be entertained at all. It is a settled principle of law that mere statement and affidavit are not the substitute for evidence because one man cannot be found as a guilty person even without hearing him. Even plaintiffs did not mount the box to give evidence in support of their contention. Just because a Commissioner has found another way, one should not jump to the conclusion that she is influenced by the defendants and she had filed a report of that nature. Therefore, I do not find any ground at this stage to set aside the Commissioner's plan and report. The court below has not

dismissed the application as such, but had directed the very same Commissioner to inspect the property and note down the particulars required by the plaintiffs.

2. The question of existence of a way or non-existence of a way is of a permanent character and one cannot under ordinary course file report against the facts. When the Commissioner revisits the property, plaintiffs are at liberty to be present with the counsel and show to the Commissioner that what she had stated in the earlier report is wrong and therefore the Commissioner will be in a position to give answer to the same. In order to enable the plaintiffs to do that I permit the plaintiffs to file a work memo before the Commissioner regarding the points which they want the Commissioner to note.

Therefore the order under challenge does not suffer from any infirmity and it is confirmed. I make it clear that by dismissing the prayer for setting aside the Commissioner's report, plaintiffs shall not be precluded from adducing evidence challenging the correctness of the report at the stage of trial.

Writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-